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No. 92-1550

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ABF FREIGHT SYSTEM, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 84 national and international unions with a total membership of approximately 14,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties, as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

1. The National Labor Relations Board ("NLRB") found that the employer in this case violated §§ 8(a)(1), (3) & (4) of the National Labor Relations Act ("NLRA") by discriminatorily discharging an employee. Manso had filed grievances and NLRB charges concerning an earlier discharge, a finding not contested here. Section 10(c) of the NLRA provides that the Board can remedy unfair labor practices by issuing "an order requiring [the employer] to take such affirmative action including rein-

statement of employees, with or without backpay, as will effectuate the policies of this [Act]." Petitioner contends that because Manso was found to have testified untruthfully during the NLRB proceedings, albeit as to an issue ultimately irrelevant to the outcome of the case, the Board is precluded from ordering Manso's reinstatement with backpay.

2. Section 10(c) has three notable features, each pertinent to this Court's consideration of ABF Freight's absolutist contention in this case. First, because the statutory directive is to "effectuate the policies of this [Act]," the starting point for reviewing the Board's exercise of its remedial authority is delineation of the pertinent statutory policies. The statute itself and this Court's cases establish that the "ruling purpose" (*Labor Board v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 265 (1938)) of the Act is promoting labor peace by assuring employees the right of self-organization and collective action, including collective bargaining. The prohibitions on discriminatory discharges promote that fundamental purpose by assuring employees that employers cannot interfere with their job security because of their exercise of rights protected by the NLRA. And, as prohibitions upon *discrimination*, § 8(a)(3) and (4) protect both model and less-than-perfect employees from interference with their job rights because of collective activity or resort to the Board's processes.

Second, reinstatement and backpay are the remedies ordinarily appropriate to effectuate the protections accorded by the discriminatory discharge prohibition. These remedies neutralize the effect of the NLRA violation to the degree possible, by concretely demonstrating both to the discriminatee and to co-employees that statutory rights can be exercised without economic loss and by restoring employees who exercise their statutory rights to the workplace, and also remove the incentive to employers to engage in discriminatory discharges in the future. Because reinstatement and backpay, like other Board remedies, are designed not to correct private injuries but to give effect to the Act's public policies, these overall statutory considerations and not simply the interests of the discriminatee are pertinent in determining whether reinstatement and backpay are proper remedies in any set of generic circumstances.

Finally, the NLRB has broad discretion in determining when the policies of the Act would be vindicated by a particular remedy, and court review is commensurately narrow.

3. Against this background, the employer's contention that the Board is precluded from ordering reinstatement and backpay with regard to any employee who testifies untruthfully before a Board ALJ borders on the frivolous.

ABF Freight's position rests, first and primarly, upon the notion that since purposeful lying on the witness stand is (obviously) to be discouraged, the Board is compelled to impose a "forfeiture" of reinstatement and backpay on untruthful witnesses in order to vindicate its own processes. But the conclusion does not follow from the premise. The NLRB's *basic* function is protection of employee self-organization and collective bargaining, not assurance of truthtelling. There are civil and criminal remedies to further the latter purpose, so it is simply untrue that absent forfeiture of reinstatement and backpay, discriminatees have nothing to lose by lying during Board proceedings. Moreover, the employer's suggested forfeiture rule would violate the proscription against punitive actions by the Board, and would only selectively punish failure to testify truthfully, since witnesses for *respondent employers*, also required to testify truthfully (and no less likely, as this case shows, to fail to do so), would not be affected. Finally, the equitable "clean hands" maxim cannot supply a rationale for petitioner's "forfeiture" rule, since equitable doctrines cannot be imported wholesale into the statutory scheme of the NLRA, and since the

doctrine, in its own terms, would not apply to vindication of the Board's interest in truthfulness.

A secondary purported basis for ABF Freight's "bright line" position here is the contention that employers must be free not to employ dishonest people. While it is true as a general matter that the NLRA does not regulate employment decisions based upon motives not proscribed by the Act, here there *was* an illegally motivated discharge, and the issue is a remedial one only. This Court's opinion in *National Labor Relations Board v. Transportation Management Corp.*, 462 U.S. 393 (1983), establishes that where an employer discharges an employee for mixed legitimate and illegal reasons, the employer can escape the usual remedy only by bearing the burden of showing that the employer *would have—not could have—* discharged the employee without regard to the illicit motive. Here, the need for full remedy is more urgent, since the employee has already been absent from the workplace for some time because of a concededly illegal discharge, with the adverse requisite impact on employee rights of self-organization. No reason appears for imposing a *less* stringent burden on the employer here than in *Transportation Management,* and the employer in this case has made no attempt to meet that burden.

While the foregoing is sufficient to resolve this case, we note as well that the Board under the present circumstances requires that the employer bear the additional burden of demonstrating that the discriminatee is objectively unfit for his former position because of his post-discharge conduct—here, testifying untruthfully under oath. Given the significant differences between this situation and that in *Transportation Management,* that additional burden "effectuates the policies of this Act" and is therefore within the Board's remedial discretion.

ARGUMENT

The NLRA, as amended, makes it an unfair labor practice for an employer "by discrimination with regard to hire or tenure of employment to encourage or discourage membership in any labor organization" and, as well, for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter." NLRA §§ 8(a)(3) & (4). 29 U.S.C. §§ 158(a)(3) & (4). The NLRA, additionally, directs that where such unfair labor practices occur, "the Board shall [issue] an order requiring [the employer] to take such affirmative action including reinstatement of employees, with or without back pay, as will effectuate the policies of this [Act]."

ABF Freight, the employer in this case, was found to have violated these provisions by discharging an employee because the employee had previously filed both Board charges and grievances under a collective bargaining agreement pertaining to his two earlier discharges.[1] In this Court, ABF Freight does *not* challenge the conclusion of the Board and of the Court of Appeals that the Act was indeed violated.

The question in this case, rather, is whether the National Labor Relations Board is, on some basis, *required* to deny reinstatement and backpay—otherwise the basic remedy deemed appropriate to "effectuate the policies of this subchapter" (NLRA § 10(c), 29 U.S.C. § 160(c)) where an employee is discharged in violation of §§ 8

[1] Because the employee in this case asserted rights under a collective bargaining agreement, his actions were protected by the NLRA, and therefore by § 8(a)(3). *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). The protection against retaliation contained in § 8(a)(4) is designed, of course, to safeguard the self-organization rights otherwise protected by the Act. Consequently, although the discharge in this case was not for the union organizing activity more traditionally at issue in discriminatory discharge cases, as such, it is subject to the same policy considerations applicable to such activity.

(a)(3) & (4)—whenever the discriminatee testifies untruthfully on the witness stand before the NLRB Administrative Law Judge ("ALJ"). The employer maintains that the NLRA mandates such a per se rule.

1. *Introduction*: To place this question in perspective, it is worth noting at the outset that the issue raised by this case will arise only where the employer, as here, has been found *guilty of an unfair labor practice*. In that circumstance, it will ordinarily be the case (again as here) that any testimony by a discriminatee that is deemed untruthful will *not* concern a central merits issue in the case; otherwise, once the employee's testimony concerning the relevant facts and circumstances surrounding the adverse employment action against him is disbelieved, the decision would be in favor of rather than against the employer.[2]

It is possible, of course, that an employee's untruthful testimony on a central merits issue could be believed by the ALJ and the NLRB and could therefore result in an unjustified finding of an unfair labor practice with reinstatement and backpay for the employee. But a remedial rule denying relief to *discovered* liars even where an unfair labor practice is found is unlikely to affect an employee who determines to lie in the hope that his or her lie will remain undiscovered and will result in a remedy running in his favor. A liar whose lie *is* material to the liability question always runs the risk that he or she will be found out, and that the employer will therefore prevail, with the necessary result that there will be no reinstatement and no backpay. Consequently, the only untruthful testimony that will be discouraged by the rule for which the employer argues is that concerning factual matters tangential to, rather than central to, the case; employees presumably will avoid such tangential lies in order to preserve entitlement to reinstatement and backpay in case the lies are discovered.

As the NLRB reports amply demonstrate, Labor Board cases often come down to findings on points on which there is conflicting testimony. And, as this case shows, in such cases the finding of an unfair labor practice frequently rests on adverse credibility determinations regarding the testimony of one or more witnesses for the *employer*, who are likely to be the employer's common law employees (if not statutory "employees" under NLRA § 2(3), 29 U.S.C. 152(3)).[3]

[2] Here, for example, the ALJ concluded that the discharged employee, Manso, did not tell his employer the truth about the reasons for his second lateness, and determined that Manso was therefore discharged for cause. Pet. App. B-59. The Board, however, found that Manso was not fired for dishonesty but for *lateness*. Pet. App. B-18. And, the Board went on to find that the reason for Manso's second lateness was simply irrelevant to the question whether his discharge was in violation of §§ 8(a)(3) & (4). The Board held that the employer's new, strict disciplinary policy for Manso's job classification only, mandating a discharge for a second unexcused lateness, could not serve as a neutral justification for the discharge, since the policy was supposed to apply only prospectively, yet was applied retroactively, and therefore disparately, to Manso. Pet. App. B-20.

[3] In this instance, the ALJ made findings, affirmed by the Board, that the employee, Manso, was telling the truth when he testified with great specificity to three incidents in which three different supervisory employees of the employer made statements to him, upon his reinstatement pursuant to an earlier grievance, to the effect that the employer would fire him again. Pet. App. B-46; Jt. App. 95-99. The three supervisory employees, however, each testified at the hearing and specifically denied, under oath, making such a statement. Jt. App. 56-57, 90-91, 118.

Similarly, the ALJ, with the Board's concurrence, found credible the testimony of a co-employee concerning an incident in which the co-employee requested permission to dial Manso a second time to see if Manso was available for work because he thought he had misdialed the first time, but was forbidden to do so by yet another supervisor, and forced to sign a form indicating that Manso was not available. Pet. App. B-47. Again, that supervisor, under oath, explicitly denied that the co-employee had expressed doubt about his dialing, or requested permission to redial. Jt. App. 62-64.

Finally, the ALJ also "flatly discredit[ed]" testimony by four other management employees concerning the employer's attitude concerning the new preferential casual system that gave rise to the

While not all adverse credibility determinations indicate that one of two disagreeing witnesses or the other is willfully lying (as opposed to simply incorrectly recollecting), in many instances it could be determined, were the question pursued, that the misstatement of fact was purposeful rather than accidental. Thus, in a substantial percentage of the instances in which employer unfair labor practices are found, *the witnesses for the employer willfully misstate the truth*, and do so in a material rather than tangential manner.[4]

In this light, it becomes apparent that petitioner's proffered broad, prophylactic rule favors material liars over tangential liars; liars for wrongdoers over liars who have not committed any unfair labor practice; and precautions against irrelevant distortions of the truth over enforcement of the statute's explicit prohibition on interference with collective activity generally and union organizing particularly.

As we show below, there is no basis in the NLRA itself, or in general principles applicable to the NLRB's proceedings, for limiting the Board's discretion to fashion reticulated, fine-tuned remedial principles intended to avoid such untoward results. As we also show, the principles applied by the Board to govern remedial issues in cases such as this are, if anything, more restrictive in

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present dispute, and noted as well that the employer's witnesses "took opposite positions on [one] point in the course of a five-minute colloquy." Pet. App. B-33.

In sum, *a total of at least eight of the employer's supervisory and managerial employees were found by the ALJ to be misstating the truth in their testimony under oath.*

[4] In this instance, there was no reason for the ALJ or the Board to make findings as to whether the discredited supervisory employees purposely lied, or simply innocently differed in their recollections from the General Counsel's witnesses; there are therefore no such findings. It seems unlikely, however, that the eight discredited supervisory employees—all apparently still employed by the employer at the time of the hearing—had similarly poor memories.

granting reinstatement and backpay than the pertinent statutory policies call for.

2. *Standards Governing the Board's Remedial Authority*: Section 10(c), 29 U.S.C. § 160(c)—the NLRA section governing the Board's remedial authority—has three notable features:

First, the broad directive to the Board is to "effectuate the policies of this [Act]." To apply this provision, then, it is necessary to have firmly in mind the pertinent policies of the NLRA, both generally and with regard to the particular unfair labor practices to be remedied. *Labor Board v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 265 (1938) ("upon the challenge of the affirmative part of an order of the Board, we look to the Act itself, read in light of its history, to ascertain its policy . . . to see whether [it] afford[s] a basis for its judgment that the action ordered is an appropriate means of carrying out that policy.")

Second, § 10(c) expressly provides for—although it does not mandate—reinstatement and backpay as appropriate remedies under the Act. Those remedies, as this Court's cases make clear, are made available not to vindicate the private interests of the discharged employees, but to implement the Act's public purposes, and their appropriateness under particular circumstances is to be judged accordingly.

Third, the NLRA's remedial provision is phrased in general terms, leaving to the Board broad discretion in determining the appropriate remedy from among those available.

Each of these aspects of § 10(c) is pertinent to this case.

(a) *Statutory Policies*: As this Court noted in the early days of the Act, Congress did not leave the Act's general policies to inference. Rather,

> Congress explicitly disclosed its purposes in declaring the policy which underlies the Act. Its ulti-

> mate concern . . . was "to eliminate the causes of certain substantial obstructions to the free flow of commerce." This vital national purpose was to be accomplished "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association." . . . [*Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 182 (1941).]

See also Virginia Electric & P. Co. v. Labor Board, 319 U.S. 533, 539 (1943); *Pennsylvania Greyhound Lines, supra*, 303 U.S. at 265-66, (the Act's "ruling purpose" is "to protect interstate commerce by securing to employees the rights . . . to organize, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for that and other purposes.")[5]

Section 8(a)(3) implements that broad policy by "insulat[ing] employees' jobs from their organizational rights . . . allow[ing] employees to freely exercise their right to join unions, be good, bad, or indifferent members . . . without imperiling their livelihood." *Radio Officers' Union v. Labor Board*, 347 U.S. 17, 40 (1954). By

[5] The NLRA was, of course, amended in 1947 and 1959, with the addition of union unfair labor practices and some concomitant changes in the Act's underlying policies. *See, e.g.*, Labor-Management Relations Act, 61 Stat. 136, c. 120, Title I, § 101 (1947) (amending the "Finding and declaration of policy" provision of § 1 of the NLRA, 29 U.S.C. § 151). This case, however, and most others in which reinstatement and backpay for discriminatees are at stake, involve the employer unfair labor practices articulated in the original, 1935 Act and left substantially unchanged in the subsequent statutory revisions.

There was one 1947 amendment that the employer notes in passing and that is pertinent to this case: As amended, § 10(c) now provides that "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause." As we suggest later (at n.8, *infra*), however, that sentence supports rather than cuts against the Board's authority to order reinstatement and backpay in the present circumstances.

thus "protect[ing] employee self-organization and the process of collective bargaining from disruptive interferences by employers" (*American Ship Building Co. v. National Labor Relations Board*, 380 U.S. 300, 317 (1965)), the prohibition upon discriminatory treatment based on union or other collective activity prevents employer actions that "inevitably operate[] against the whole idea of the legitimacy of organization [and] . . . undermine[] the principle which, as we have seen, is recognized as basic to the attainment of industrial peace." *Phelps-Dodge Corp., supra*, 313 U.S. at 185; *see also id.* at 186 ("embargo against employment of union labor was notoriously one of the chief obstructions to collective bargaining through self-organization. Indisputably, the removal of such obstructions was the driving force behind the enactment of the National Labor Relations Act.")

As a prohibition upon *discrimination* based on union activity, § 8(a)(3) necessarily limits an employer's prerogative to enforce otherwise legitimate employment-related rules, where the enforcement is intended to and "is likely to discourage participation in union activities." *Metropolitan Edison v. National Labor Relations Board*, 460 U.S. 693, 700 (1983). Thus, for example, "where many have broken a shop rule, but only union leaders have been discharged, the Board need not listen too long to the plea that shop discipline was simply being enforced." *American Ship Building Co., supra*, 380 U.S. at 312.[6] Similarly, an employer may refuse to reinstate

[6] Because "a finding of violation under [§ 8(a)(3)] will normally turn on the employer's motivation" (*American Ship Building Co., supra*, 380 U.S. at 311), the Board and this Court has developed a set of procedural rules for determining the motive question. *Metropolitan Edison Co., supra*, 460 U.S. at 701-02; *National Labor Relations Board v. Transportation Management Corp.*, 462 U.S. 393, 401-02 (1983). Since there is no question before the Court in this case concerning whether the employer in fact committed the unfair labor practice found, the precise manner in which anti-union animus must be proved in § 8(a)(3) cases is not an issue here.

striking employees in positions filled by permanent replacements and "might resort[] to any one of a number of methods of determining which of its striking employees would have to wait because five men had taken permanent positions after the strike" but may not purposely "discriminate against those most active in the union." *Labor Board v. Mackay Radio & Tele. Co.*, 304 U.S. 33, 347 (1938).

In short, the policy underlying § 8(a)(3) and related provisions is to provide assurance to employees generally that engaging in collective activity will *not* endanger their job security, so that they will feel free to engage in such activity. This assurance is necessarily provided to both model employees and less-than-perfect ones; otherwise—since most individuals are less-than-perfect—security in engaging in collective action could not be assured, and the Act's "ruling purpose" could not be achieved.

(b) *The reinstatement and backpay remedies*: Since the earliest days of the Act, this Court has also recognized that ordinarily, "complete relief" in a § 8(a)(3) case demands that "discrimination be neutralized by [the discriminatees] being given their former positions and reimbursed for the loss due to the lack of employment consequent upon the respondent's discrimination." *Mackay Radio & Tele. Co., supra*, 304 U.S. at 348. Reinstatement in particular is "the conventional correction for discriminatory discharges" (*Phelps Dodge Corp., supra*, 313 U.S. at 187) because it "require[s] the discrimination to cease not abstractly, but in the concrete victimizing instances. *Id.* at 188. As such, reinstatement (and backpay) are "means of removing or avoiding the consequences of a violation where those consequences are of a kind to thwart the purposes of the Act." *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 236 (1938).

Although reinstatement and backpay, unlike many other NLRA remedies, flow to individual employees,

rather than to employees as a group, this Court has emphasized that the central function of that remedy is *not* "correction of private injuries" but " 'giv[ing] effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining.' " *Phelps Dodge, supra*, 313 U.S. at 193, *quoting National Licorice Co. v. Labor Board*, 309 U.S. 350, 362 (1940). Because "the central purpose of the Act [is] directed . . . toward achievement and maintenance of workers' self-organization" (*Phelps Dodge*, 313 U.S. at 193), the appropriateness of reinstatement and backpay must be judged against that public purpose, not against standards applicable when only " 'adjudication of private rights' " is at stake. *Id., quoting National Licorice Co., supra*, 309 U.S. at 602). *See also Shepard v. National Labor Relations Board*, 459 U.S. 344, 350 (1983); *Automobile Workers v. Russell*, 356 U.S. 634, 642-43 (1958); *Virginia Electric & P. Co., supra*, 319 U.S. at 549.

Phelps Dodge held, for example, that an employee who has suffered no economic loss due to a discriminatory discharge can still be eligible for reinstatement:

> [T]here are factors other than loss of wages to a particular worker to be considered . . . [T]o deny the Board the power to wipe out the prior discrimination by ordering the employment of such workers would sanction a most effective way of defeating the right of self-organization. . . . Again, without such a remedy industrial peace might be endangered because workers would be resentful of their inability to return to the jobs to which they may have been attached and from which they were wrongfully discharged. [313 U.S. at 193, 195.]

Thus, factors not directly related to making whole the particular employee whose discharge is being remedied are entitled to substantial weight in developing the principles governing reinstatement and backpay remedies under § 10(c). Those factors include: the effect denial

of reinstatement and backpay to one employee discharged for union activity may have in diminishing *other* employees' propensity to engage in protected activity in the future; the impact on future union activity when an employer successfully eliminates union activists and leaders from the workplace; and the need for a strong and consistent disincentive to employer discharges of employees for union activity, which purely prospective relief cannot supply.

(c) *Board Discretion Concerning Remedies*: The final critical feature of § 10(c) for purposes of this case is that because the Act does not create rights for individuals which "must be vindicated according to a rigid scheme of remedies [but] entrusts to an expert agency the maintenance of industrial peace" (*Phelps Dodge, supra,* 313 U.S. at 194), "Congress has delegated to the Board the power to determine when the policies of the Act would be effectuated by a particular remedy." *Shepard, supra,* 459 U.S. at 349.

As a consequence of this delegation,

> the relation of remedy to policy is *peculiarly* a matter for administrative competence[.] [C]ourts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. [*Phelps Dodge, supra,* 313 U.S. at 194, emphasis supplied.]

See also National Labor Relations Board v. Gissel Packing Co., 395 U.S. 575, 612 n.32 (emphasis supplied) (1969) (Board's "choice of remedy must be given *special* respect by reviewing courts"); *Shepard, supra,* 459 U.S. at 349.

The pertinent question, then, is whether there is anything "in the language or structure of the Act that requires the Board to reflexively [refuse to] order . . . 'complete relief' " (*Shepard,* 459 U.S. at 352) for illegally discharged employees because the employee does not tell the truth at a Board hearing, or whether, instead, "the Board acted within its authority in deciding that a [reinstatement and backpay] order in this case would . . . effectuate the policies of the act." *Id.*

3. *Petitioner's "Forfeiture" Rule*: Tested against the pertinent statutory policies, the public purpose of the Act's reinstatement and backpay remedies, and the broad discretion accorded the Board in "the relation of remedy to policy" (*Phelps Dodge, supra,* 313 U.S. at 194), ABF Freight's arguments (and those of its *amici curiae*) in support of the proposition that the Board can *never* reinstate with backpay an employee who testified falsely at a Board hearing border on the frivolous.[7]

There are two distinct strains to the argument of ABF Freight and its *amici curiae,* although on occasion the two are melded together. The first strain focuses on the Board's interest in its own processes, and maintains that reinstatement and backpay must be denied in a case like this to vindicate the interest in deterring untruthful testimony before the Board. The second line of argument focuses on the employer's own interests, and insists that because false testimony is a species of misconduct that *can* justify discharge, an employer who has violated the NLRA by discharging an employee for a different—*and unlawful*—reason should be able to resist reinstatement and backpay if the employee later gives false testimony in a Board proceeding.

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[7] The American Trucking Associations ("ATA") argues for a slightly less absolute rule—that the NLRB may not reinstate with backpay an employee who "testified falsely as to a *material* issue." Brief for the American Trucking Associations as Amicus Curiae ("ATA Br.) at (i) (emphasis supplied). ATA then goes on, however, to define a "material" issue to include questions whose answer in fact played no role in the ultimate determination, but *might* have been relevant had the Board taken a different view of the facts than it did. ATA Br. at 9. While that definition of "materiality" may, as ATA indicates, have some force in certain criminal contexts, it does not provide a basis for overturning the judgment below.

(a) *Vindication of Board Processes*: The employer's "abuse of the Board's processes" arguments proceed from the truism that the Labor Board, like other administrative agencies and courts, places an obligation on witnesses appearing before an ALJ to testify truthfully, by administering an oath prescribed by the Federal Rules of Evidence Rule 603 and otherwise. For a myriad of reasons, however, the general policy favoring truthtelling in administrative proceedings cannot alone supply the basis for denying a remedy otherwise appropriate to "effectuate the policies of [the NLRA]."

First, and most obviously, as this Court's cases make clear, the NLRA's "ruling purpose" (*Pennsylvania Greyhound Lines, supra*, 303 U.S. at 265-66) and "driving force" (*Phelps Dodge Corp., supra*, 313 U.S. at 186) is assuring industrial peace through protection of employee self-organization and collective bargaining. *See Republic Steel Corp. v. Labor Board*, 311 U.S. 7, 13 (1940) (remedy improper under § 10(c) where the "order is not directed to the appropriate effectuating of the National Labor Relations Act, but to the effectuating of a distinct and broader policy . . . not the function of the Board.") And, for reasons we have already canvassed, reinstatement and backpay have long been recognized as essential to vindicating that true policy of the Act when an employee has been fired for engaging in activity protected by the statute. The fellow employees of an illegally discharged employee, for example, are likely to be aware of the circumstances of the discharge, but not of the proceedings before the Board; consequently, if the illegally discharged employee never returns to the workplace because of his actions at the hearing, the fear of discharge for union activities among other employees is likely to persist.[8]

[8] We note as well that § 10(c) does expressly preclude reinstatement and backpay in one instance—where the employee was discharged for cause. *See* n.5, *supra*; *see also Transportation Management Corp., supra*, 462 U.S. at 401. Since there is no similar barrier to reinstatement and backpay in the present circumstances,

Additionally, there is no reason to subordinate the Act's expressed policies, and to permit employers to succeed in removing union activists and other employees who engage in activity protected by the statute, when there are other, more traditional ways of vindicating the Board's interest in the accuracy of its own processes. The NLRA "is not a cause of action for perjury; we have other civil and criminal remedies for that." *St. Mary's Honor Center v. Hicks*, —— U.S. ——, 113 S. Ct. 2742, 2754 (1993). The function of the oath requirement upon which the employer relies is precisely to bring the witness within the coverage of those remedies.

Thus, it is simply untrue that unless the employer's absolute rule or a close variant thereof is adopted, "an employee appears to have nothing to lose by lying during unfair labor practice proceedings." ATA Br. at 10. *Cf. St. Mary's Honor Center, supra*, 113 S. Ct. at 2754 ("what an extraordinary notion, that we 'exempt [employers who give pretextual explanations of discharges] from responsibility for their lies' unless we enter . . . judgment for plaintiffs!")

Further, both witnesses for the General Counsel and witnesses for respondent are required to testify under oath. *There is no greater or less Board or public interest in having truthful testimony from one than from the other.*[9] As to respondents' witnesses (and General Counsel witnesses who are not themselves the illegally discharged employees), possible prosecution for perjury and concomitant

where the discharge was *not* for cause but for reasons proscribed by the Act, the fair inference is that the determination of the appropriate rule for circumstances in which a *post-discharge* basis for denying reinstatement is claimed is, like other aspects of the administration of remedies under the Act, left to the Board's sound discretion.

[9] As noted (n.3, *supra*), in this case, the ALJ and the Board concluded that except for his testimony concerning the reason for his lateness, the discharged employee was telling the truth; the ALJ and the Board, however, determined that *the employer's supervisory and management employees were, in general, not truthful.*

punishment is the *only* deterrent against rampant lying before the Labor Board. The employer's suggested absolute rule, then, "is not even a fair and even-handed punishment for vice, when one realizes how strangely selective it is." *St. Mary's Honor Center, supra,* 113 S. Ct. at 2754.[10]

It would be possible, of course, to devise an even-handed rule concerning lying before the NLRB. That would require adoption of the rule—in addition to the employer's proffered rule—that purposeful lying by respondent's witnesses automatically leads to reinstatement and backpay of the complaining employee, regardless whether he or she was in fact discriminatorily discharged. To state that possibility, however, is simply to underline why it is that the employer's proffered rule does not "effectuate the policies of the Act."

Obviously, it does not effectuate those purposes to grant reinstatement and backpay—or any other remedy—to an individual who was not in fact discriminated against in violation of the NLRA, because of behavior by the employer's agent that is independently illegal but *not* a violation of the NLRA. Cf. *St. Mary's Honor Center, supra,* at 2754-55. No reason appears why it any more effectuates the Act's policies to *deny* otherwise appropriate relief for such a reason.

Furthermore, denial of the usual reinstatement and backpay in order to vindicate the general public policy

[10] There is also the fact that the Board's processes would be greatly burdened were it necessary to determine the truthfulness of every statement, or even every potentially material but actually irrelevant statement, made by a witness before the Board as a precondition to determining the appropriate remedy. That is particularly so since, "there is no justification for assuming . . . that those [witnesses] who evidence is disbelieved are perjurers and liars." *St. Mary's Honor Center v. Hicks,* —— U.S. ——, 113 S. Ct. 2742, 2755 (1993). Consequently, there would need to be a determination in each instance concerning whether the misstatement was purposeful or not. *See* n.4, *supra.* The result could be a set of veritable perjury mini-trials as part of every Board proceeding.

favoring telling the truth would be punitive, as the employer's reference to the employee "forfeit[ing]" reinstatement and backpay indicates. The purpose of such a "forfeiture" would be to deter abuse of the Board's processes, not to remedy a violation of the Act. And, § 10(c)

> does not go so far as to confer a punitive jurisdiction. . . . The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act. [*Consolidated Edison Co., supra,* 305 U.S. at 235-236.]

The employer's references to the equitable "clean hands" doctrine fares no better in supplying a rationale for the rule the employer supports. In its traditional formulation, the clean hands doctrine provides that:

> "whenever a party who as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith or other equitable principle in his prior conduct, then the doors of the court will be shut against him . . . the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." [*Keystone Driller Co. v. General Excavator Co.,* 290 U.S. 240, 245 (1933), *quoting* Pomeroy, *Equity Jurisprudence* (4th Ed.) § 307.]

For several reasons, this principle cannot supply the rationale for imposing a "forfeiture" of the Act's reinstatement and backpay remedy in order to vindicate the Board's interest in the integrity of its procedures.

Initially, this Court has stated emphatically that equity maxims are not to be imported into the NLRA by rote:

> [A] back pay order does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices. In this [it] somewhat resemble[s] compensation for private injury, but it must constantly be remembered that [the] . . . remed[y is] created by statute . . . designed to

> aid the elimination of industrial conflict. [It] vindicate[s] public, not private rights. . . . For this reason it is . . . *wrong to fetter the Board's discretion by compelling it to observe conventional . . . chancery principles in fashioning such an order.* [*Virginia Electric & P. Co., supra,* 319 U.S. at 543 (emphasis supplied).]

See also Phelps Dodge Corp., supra, 313 U.S. at 188 (emphasis supplied) ("Attainment of a great national policy through expert administration in collaboration with limited judicial review *must not be confined within narrow cannons for equitable relief deemed suitable by chancellors in ordinary private controversies.*").[11] Indeed, the public nature of the Board's proceedings is reflected in their structure. In an unfair labor practice proceeding, the discharged employee is not the "party who as actor, seeks to set the judicial machinery in motion and obtain some remedy"—the General Counsel is, through the discretion-

[11] More generally, this Court, and the lower federal courts following this Court's lead, have declined to import both common law and equitable defenses into statutory schemes where to do so would not advance the purposes of the statute. Thus, *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138 (1968), declined to apply the common law *in pari delicto* doctrine to antitrust law, because even if

> [t]he plaintiff who reaps the reward of treble damages [is] no less morally reprehensible than the defendant . . . the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct.

See also, A.C. Frost & Co. v. Coeur D'alene Mines Corp., 312 U.S. 38, 40 and 43-44, n.2 (1941); *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852 (9th Cir. 1979); *Lawler v. Gilliam*, 569 F.2d 1283 (4th Cir. 1978).

For reasons already canvassed, applying a "forfeiture" rule in the present circumstances would not advance the policies of the NLRA.

ary filing of a complaint.[12] *Vaca v. Sipes,* 386 U.S. 171, 182 (1967); *National Labor Relations Board v. Food & Commercial Workers Local 23 (Charley Bros.),* 484 U.S. 112 (1987).

Additionally, even if the clean hands doctrine applied here, it would not make mandatory denial of relief at a respondent's behest because of a possible adverse impact on the Board's processes. The clean hands doctrine is a principle "not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion." *Keystone Driller, supra,* 290 U.S. at 245-246. And, the doctrine "does not make the quality of suitors the test" or "apply . . . by way of punishment for extraneous transgressions." *Id.* at 245. Rather, the clean hands maxim justifies—but does not require—refusing to entertain a suit where the opposing party in the suit is actually injured by the offending party's behavior; "[t]he wrong must have been done to the defendant himself and not to some third party." Pomeroy, *Treatise on Equity Jurisprudence* (5th Ed. 1941) § 399; *see also id.* ("a wrong which has been righted may not be pleaded against a party to a suit in equity."); *Lawler, supra,* 569 F.2d at 1294 n.7. Here, the claimed injury—abuse of the Board's processes—is to the Board, not to the employer; and the employer was not in fact injured even indirectly, since the lie was found out and not relied upon in concluding that the employer violated the statute.

In sum, recognition of an absolute, mandatory defense to a reinstatement and backpay order for untruthful testimony by the discriminatee in order to preserve the integrity of the Board's own processes is consistent with neither NLRA § 10(c) nor any more general legal principles.[13]

[12] While the discharged employee *may* file the charge that triggers the General Counsel's investigation and determination whether to file a complaint, the NLRA permits such charges to be filed by anyone—a co-employee or a union, for example. NLRA § 10(b); NLRB Rules and Regulations, Subpart A, § 102.9.

[13] In certain, narrow circumstances, the NLRB takes the view that the traditional *backpay* remedy can be modified as a sanction

(b) *Preservation of Management Rights*: (i) *The nondiscrimination standard*: The other strain of the employer's argument relies upon its management interest in assuring the honesty of its employees. The contention is that since dishonesty, including lying under oath, *could*

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for gross abuse of the Board's processes. *See, e.g., American Navigation Co.*, 268 NLRB 426, 428 (1983) (where a discriminatee conceals interim employment in a backpay proceeding, the Board will deny backpay for the entire quarter in which concealed employment occurred but no longer, in order to "discourage claimants from abusing the Board's processes and . . . also deter respondents from committing future unfair labor practices); *Lear Siegler Management Service Corp.*, 306 NLRB No. 84 (1992) (where a discriminatee threatens a witness in a Board proceeding in order to induce the witness to testify in a certain way, backpay will be tolled as of the date of the threat in order to "protect[] the integrity of the Board's processes . . . [while] ensur[ing] that a respondent's unlawful discrimination does not go unremedied.")

The Board will not, however, deny *reinstatement* in order to vindicate the Board's interest in the integrity of its processes. *Id.* ("interference with the Board's process . . . does not alone warrant the denial of reinstatement," although the same behavior that constitutes interference could also be evidence of unfitness as an employee and warrant denial of reinstatement for that reason).

We doubt that even the Board's limited forfeiture of backpay rule can be squared with § 10(c). In particular, protection of the Board's processes is a means, not an end, under the NLRA, and cannot fairly be termed an "equally important" policy of the Act (*Lear Siegler, supra*, slip op. at 2) with remedying unfair labor practices. The punitive forfeiture of backpay is not necessary to protect the integrity of the Board's processes, since other civil and criminal remedies are available; and forfeiture of backpay serves its purported purpose selectively and inadequately, since employers and third-party witnesses may also seek to abuse the Board's processes but, because they are not eligible for backpay, cannot be punished by its denial.

Be that as it may, because the employer is arguing only for an absolute, bright-line rule and does not seek to come under the Board's standards governing denial of backpay to vindicate Board processes, the Court can leave to another day the question whether the Board's current *American Navigation/Lear Siegler* approach is consistent with the Act.

be a ground for discharge absent antiunion animus, an employer should be free of all reinstatement and backpay obligations to a "lying" discriminatee. Brief for Petitioner at 18-19, 30-34; ATA Br. at 12-14.[14] The proposition, as posited, cannot be squared either with the basic discrimination standard of NLRA §§ 8(a)(3) & (4) or with this Court's decision in *Transportation Management Corp., supra.*

It is true, of course, that the NLRA "permits a discharge for any reason other than union activity or agitation for collective bargaining with employees [or retaliation for invoking the Board's processes]." *Associated Press v. Labor Board*, 301 U.S. 103, 132 (1937). But §§ 8(a)(3) and (4) proscribe *discrimination* against employees based upon union activity. This standard, as noted previously, protects both less-than-perfect employees—*viz.*, those who "have broken a shop rule" (*American Ship Building Co., supra*, 380 U.S. at 312)—and those model employees who have not done so. Indeed, the need to prohibit uneven enforcement of "shop rules" against union adherents and activists is what § 8(a)(3) is all about. Thus, the fact that a particular post-discharge action by an employee *could* have justified discharge under a particular employer's "shop rules" certainly does not indicate that the employee *would* actually have been discharged for that reason had he or she still been employed, or that, if he or she was so discharged, the "shop rule" rather than a continuation of the original antiunion or retaliatory motive would have been the reason.

It is also to the point that, in this case, and other like cases, it has already been determined that "[t]he employer is a wrongdoer; he has acted out of a motive that is declared

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[14] This strain of petitioner's argument would apply equally to any species of employee conduct occurring after an illegal discharge that an employer claims would justify discharge had it occurred while the individual was still employed.

illegitimate by the statute." *Transportation Management Corp., supra,* 462 U.S. at 403. And, as we have seen, the "policies of the [Act]" support reinstatement and backpay in order to neutralize the effect of the illegal discriminatory discharge on the workplace as a whole (as well as on the discriminatee), and to deter future employer actions intended to interfere with collective activity or resort to the Board's processes.

The force of this point is redoubled by the further fact that it is the employer's own illegal behavior that has created a situation in which the employee was in fact *not* working at the time of his or her infraction of the employer's rules. Under these circumstances, judgments about whether the infraction would have led to discharge had the employee been at work at the time, and whether that discharge had it occurred would have been due to union activity or the even-handed enforcement of shop rules becomes one that is *doubly* hypothetical, and therefore doubly difficult to decide accurately.

Against this background, the question then becomes under what circumstances the usual remedy for the employer's illegal actions, with its salutary effect of reversing to some degree the adverse impact of the earlier discharges on employee self-organization and assertion of rights under the Act, *must* yield to the employer's proffered management interests in enforcing "shop rules". This Court's opinion in *Transportation Management Corp., supra,* and the underlying Board cases (*e.g., Wright Line,* 251 NLRB 1083 (1982)) provides an initial answer to that question (although, for reasons discussed below, the present circumstances are sufficiently different to justify the Board's rule that an *additional* evidentiary burden, not imposed by the *Wright Line* cases, also be placed upon employers resisting reinstatement and back pay).

Transportation Management involved the situation in which the employer's reasons for the *original* discharge

involved *both* antiunion animus and considerations not proscribed by the Act. Under those circumstances, this Court held, the Board is justified in concluding, first, that "to establish an unfair labor practice the General Counsel need show . . . only that a discharge is in any way motivated by a desire to frustrate union activity" (462 U.S. at 399), and, second, that the employer cannot avoid remedying the illegally motivated discharge with reinstatement and backpay unless the employer carriers the "burden [of] . . . prov[ing] that absent the improper motivation he would have acted in the same manner for wholly legitimate reasons." *Id.* at 401.[15]

No reason appears why the employer in the present circumstances should carry any *less* burden to justify a refusal fully to "neutralize" the impact of its illegal behavior. Here, the *original* discharge indisputably would *not* have occurred absent an illegal motive, and the discharged employee was therefore definitely out of the workplace, and suffering economic losses, for a period of time because of a violation of the Act, with the same impact upon employee self-organization and assertion of protected NLRA rights as if the post-discharge infraction (if such it is) had not occurred. In a *Transportation Management* situation, on the other hand, it is unclear whether or not there would have been *any impact at all* on the employee or on the workplace due to the employer's illegal motive, since the very same adverse consequences may well have ensued in any case.

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[15] The Board rule reviewed in *Transportation Management* declines to find any violation of the Act at all where the employer succeeds in making out the required affirmative defense. This Court, however, expressly noted that

> the Board might have considered a showing by the employer that the adverse action would have occurred in any event as not obviating a violation adjudication but as going only to the permissible remedy, in which event the burden of proof could surely have been put on the employer. [462 U.S. at 402.]

Moreover, as in *Transportation Management,* "[i]t is fair that [the employer] bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by [its] own wrongdoing." 462 U.S. at 403. Indeed, the risk of uncertainty problem is considerably more pronounced in cases like this one than in *Transportation Management*: The hypothetical factual issue in *Transportation Management* involved not what the employer did and under what circumstances but why. The very concreteness of the circumstances of an actual discharge aids in drawing inferences concerning likely motivation. Here, in contrast, because of the employer's illegal acts it is impossible to establish *other than entirely hypothetically* whether the employee would have been discharged at all at some point after the original, illegal discharge, and whether, if so, the hypothetical discharge would have been legally or illegally motivated.[16]

[16] While the Board has at times been less than precise on this point, we read the Board's most recent cases as applying the *Transportation Management* approach as part, but not all, of the employer's burden in justifying refusing reinstatement and backpay because of employee behavior occurring after the original discharge. *See Owens Illinois Inc.*, 290 NLRB 1193 (1988), *enforced without opinion*, 872 F.2d 413 (3rd Cir. 1989) (fact that employer did not discharge officials who testified falsely indicates that the employer could not meet its burden of proof because it cannot show that the employee would not have been retained due to his false testimony).

We note, although the issue is not directly related to this case, that the Board has not consistently applied precisely the *Wright Line* approach to situations related to but different from those before the Court, for reasons that are unclear.

For example, where an employer's original discharge would not have occurred but for illegal motives, yet facts turn up during the course of the unfair labor practice adjudication that might have justified the original discharge had the employer known of them, the Board does place the burden of proof on the employer to establish the facts that justify denial of back pay and reinstatement. *John Cuneo, Inc.*, 298 NLRB 856 (1990). That burden, however, seems to be somewhat less than the one imposed in the *Wright Line* cases, since the employer need not show that the employee *would* have been discharged for proper reasons, but only that "the discriminatee's conduct would have *provided grounds* for termination based on a preexisting lawfully applied company policy." *John Cuneo, Inc.*, 298 NLRB at 857 n.7 (emphasis supplied); *see also id.* at 856 (emphasis supplied) (sufficient that "the Respondent *probably would not have retained* [the employee] after it learned of his misstatement.")

After-acquired evidence situations involve facts that in many instances would not have been uncovered at all by the employer but for its illegal activity and the ensuing unfair labor practice proceedings. Consequently, permitting reliance on after-acquired evidence as a basis for denying reinstatement and backpay carries a grave likelihood of undermining the policies of the Act. Both the discharged employee and co-employees could see the ultimate exclusion from the workplace as in some sense "caused" by the illegal activity, leading to an unwillingness to engage in such activity in the future. And the disincentive to committing unfair labor practices is to some extent diluted where the employer may be able to escape the costs of doing so by combing the employee's record for previously undiscovered infractions. One would think, consequently, that the employer's burden would be greater, not less, in those cases than where, as in *Transportation Management*, the employer's legitimate motivation was known at the time of the discharge.

[17] The employer's reliance upon the "could have fired" approach is understandable, since it entirely failed to meet any burden of proof as to what it would have done and why. Thus, as in *Owens Illinois*, the employer in this case entirely failed to present *any* facts indicating that it would have discharged Manso for false testimony alone, even if Manso had *not* invoked the Board processes in the first place and was testifying for the employer rather than against it. And, as in *Owens Illinois*, it does not appear that the employer could have met its burden had it tried to do so, since eight different management representatives were also determined to have

Thus, the employer's assertion that it can resist reinstatement and backpay simply because dishonesty *can* justify discharge, without meeting the burden of at least demonstrating that the employer would *have* discharged Manso for his untruthful testimony without regard to his protected activity, must fail at the threshold, as inconsistent with *Transportation Management.*[17]

(ii) *The Board's two-pronged approach*: The NLRB has not regarded the *Transportation Management* hypothetical non-discrimination standard as sufficient to "effectuate the policies of the Act" where the employee was in fact discharged for illegal reasons and was out of the workplace as a result during the time that the asserted new grounds for discharge occurred. Rather, the Board has maintained consistently that

> [w]hile seeking to be excused from his obligation to reinstate or to pay backpay [for reasons] . . . not a factor in the discriminatory action, an employer has a heavier burden than when he is merely seeking to justify the original discrimination. In the former case, he has the burden of proving misconduct so flagrant as to render the employee unfit for further service, or a threat to efficiency in the plant. [*O'Daniel Oldsmobile*, 179 NLRB 398, 405 (1969)].

See also, e.g., Mandarin, 228 NLRB 930, 931-32 (1977); *Owens Illinois, supra*, 290 NLRB at 1193; *Service Garage, Inc.*, 256 NLRB 931 (1981), *enforcement denied on other grounds*, 668 F.2d 247 (6th Cir. 1982). In applying this standard, the Board looks to the particular job previously held by the employee and to other circumstances, and determines whether or not the nature of the post-discharge infraction would render the employee objectively unfit for the position.

Since the employer's position in this case with regard to its purported management prerogatives justification is inconsistent with *Transportation Management*, and because the employer failed to meet its burden under *Transportation Management*, the further question whether the second, objective unfitness standard applied by the Board is consistent with § 10(c) is not directly presented. Were the Court nonetheless to reach that question, however, it should uphold the Board's two-pronged standard as within

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testified falsely and "there is no indication that the Respondent took any action against these officials." 290 NLRB at 1194.

the broad discretion of the Board with regard to "the relation of remedy to policy." *Phelps Dodge, supra*, 313 U.S. at 194.

As noted above, this species of case differs from *Transportation Management* in several critical respects, all of which support the "unfitness" prong of the Board's test:

First, the discriminatee has been absent from the workplace for some period of time because of the employer's illegal discharge, with the concomitant interference with the assertion of protected rights by the discriminatee *and* by co-employees. "Denial of the normal remedy leaves the effects of the Respondent's unlawful conduct unremedied and thus, fails to effectuate the policies of the Act." *Owens Illinois, supra*, 290 NLRB at 1193.

Second, since the employer in the current circumstances has already caused some of the harms against which NLRA §§ 8(a)(3) & (4) are directed, it is sensible to conclude that those harms should be remedied as usual absent some *overriding* reason. The employer's *usual* management prerogatives, exercised through nondiscriminatory application of workplace rules, applicable when there has been no illegal activity, do not alone supply that reason where the employer has already acted in an unlawful manner threatening the Act's policies.

Third, the task of proving what would have happened but for the employer's illegal action is vastly complicated by the fact that no actual second discharge occurred; the employer can therefore often make representations regarding what would have happened that cannot be tested against the facts of an actual occurrence. Again, requiring the employer to prove the employees objectively unfit demands that the employer make a demonstration relating to present, real circumstances, and provides a useful safeguard against self-serving, unverifiable testimony.

Fourth and finally, where, as here, the asserted infraction relates to testimony in a Board proceeding against the employer's interests, there is the additional factor that the right to give such testimony is itself affirmatively protected by § 8(a)(4), so that a Board-administered check on the employer's own standards is justified in order to separate protected from unprotected activity as a basis for adverse employer action, and to avoid a chill on protected activity. Cf. *Linn v. Plant Guard Workers*, 383 U.S. 53, 64-65 (1966).

The Board's two-prong standard for cases concerning asserted post-discharge infractions by discriminatees therefore "effectuates the policies of the Act," by assuring a meaningful remedy for adjudicated unfair labor practices except where the strongest countervailing considerations are present. That the employer's position in this case seeks to upset that standard without justification is yet another reason the employer cannot prevail.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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